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Employment Law
ALERT

IN THIS ISSUE

Boardrooms are not courts: The decriminalised approach to workplace discipline

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Boardrooms are not courts: The decriminalised approach to workplace discipline

Misconduct is inevitable in every workplace, but not each instance of misconduct is always addressed as the disciplinary process can feel overwhelming.

Recently, a few judgments have pronounced on the concept of a decriminalised approach. The case law supports an approach to discipline that has changed from the archaic 'criminal justice model' to the post-constitutional 'decriminalised approach'. One of the major obstacles to decriminalising the workplace is that existing disciplinary codes that are based on a criminal justice model have been entrenched into contracts of employment or collective agreements.

Long gone are the days that workplace discipline required formal disciplinary procedures that incorporate all the trimmings of a criminal trial.

We succinctly discuss what the decriminalised approach means, in practical terms.

An employee does not have a right to a formal enquiry (or hearing)

An employee is only entitled to an opportunity to state a case in response to allegations of misconduct. This does not have to be facilitated through a formal enquiry. It means no more than that there should be dialogue and an opportunity for reflection before any decision is taken to dismiss.

Furthermore, senior and managerial employees should be mindful that this principle finds greater application in respect of them. The manner in which the right of an employee to be heard must be adhered to, may be relaxed in the case of senior and managerial employees. The opportunity given to a senior employee must still meet at least the two basic requirements of an employee's right to be heard, namely, provision of sufficient notice of the contemplated action and an opportunity to be heard.

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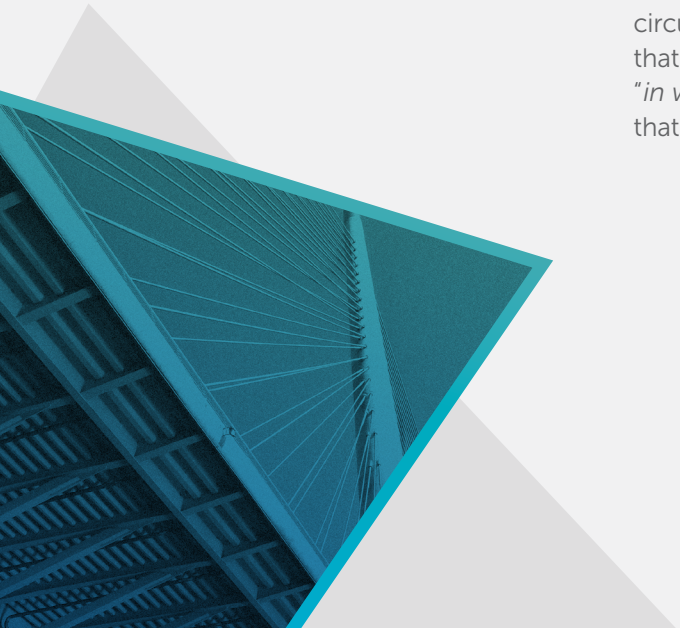

An employee does not always have a right to an in-person (oral) enquiry (or hearing)

In circumstances where an employee's misconduct is manifest, common cause, or not in dispute, a less formal process will suffice. In those circumstances an employer's invitation to an employee to make representations (whether in writing or orally) is eminently reasonable and fair. In conceiving the notion of effective dispute resolution, the law does not prescribe a painstaking process of convening an elaborate disciplinary hearing for each instance of misconduct.

Additionally, exceptional circumstances may exist in a matter that justifies a different (truncated "*in writing*") process to ensure that it is finalised timeously.

Even when an employer's disciplinary code and procedure provides for a formal (oral) hearing, the Labour Court has accepted that the code merely represents guidelines and is not to be elevated to an immutable code which is to be applied rigidly regardless of the circumstances.

Finally, the courts have recognised that insistence on the 'criminal justice model' can lead to unbusinesslike and even absurd results.

Accordingly, employers are best advised to negotiate out of onerous contractual provisions and amend their disciplinary codes to embrace a more flexible model. Workplaces do not form part of the criminal justice system, boardrooms are not courtrooms, and employees are not presiding officers.

Aadil Patel, Anli Bezuidenhout, and JJ van der Walt.

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Our BBBEE verification is one of several components of our transformation strategy and we continue to seek ways of improving it in a meaningful manner.

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